

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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UNITED STATES OF AMERICA, on :
behalf of and for the use of
POLIED ENVIRONMENTAL SERVICES;
INC., :

Plaintiff, :

- against -

No. 3:02CV01254(GLG)

: **MEMORANDUM DECISION**

INCOR GROUP, INC., :
GREENWICH INSURANCE COMPANY, :
USA CONTRACTORS, INC., and :
UNITED STATES FIDELITY AND :
GUARANTY COMPANY, :

Defendants. :

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Following this Court's dismissal of the Miller Act claims against defendants Greenwich Insurance Company ("Greenwich") and United States Fidelity and Guaranty Company, ("USF&G"), use-plaintiff, Polied Environmental Services, Inc. ("Polied"), has filed a second amended complaint. The second amended complaint differs from the first amended complaint in only two respects: (1) Polied has attached copies of the payment bonds (Ex. A & Ex. B); and (2) Polied has alleged that all four defendants, Incor Group, Inc. ("Incor"), USA Contractors, Inc. ("USA, Inc."), Greenwich, and USF&G, are liable to it under the payment bonds that each posted for the Project pursuant to 40 U.S.C. § 270a and 270b. (Pl.'s 2d Am. Comp. ¶ 13.)

Defendants Greenwich, Incor, and USA, Inc.,¹ now move this Court to dismiss plaintiff's second amended complaint for failure to state a claim upon which relief may be granted [Doc. # 36].

As to Count One, defendants Greenwich and Incor assert that they can have no liability under the Miller Act because the payment bond furnished by Greenwich on the subcontract was a private bond not subject to the Miller Act. As to Count Two, which is brought under Connecticut's Unfair Trade Practices Act ("CUTPA"), they assert that, assuming that they have no liability under the Miller Act, then they can have no liability under CUTPA because Polied's CUTPA claim is premised solely on their alleged violation of the Miller Act.

The Miller Act, 40 U.S.C. § 270b(a) provides in relevant part:

Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under sections 270a to 270d-1 of this title and who has not been paid in full therefor . . . shall have the right to sue on such payment bond

(Emphasis added). Thus, the Miller Act, by its terms, gives plaintiff the right to sue on payment bonds furnished under sections 270a to 270d-1. It provides no right of action on other payment bonds, whether furnished pursuant to private contractual arrangements or under state law.

¹ Although the motion states that it is brought by USA, Inc., neither the motion nor accompanying memorandum seeks dismissal of the complaint as to USA, Inc.

The Miller Act is applicable only where the work in question was contracted for by the United States, or one of its agents or agencies. United States ex rel. Tri-State Road Boring, Inc. v. United States Fidelity & Guaranty Co., 959 F. Supp. 345, 347 (E.D. La. 1996); see also United States ex rel. Miller v. Mattingly Bridge Co., 344 F. Supp 459, 461 (W.D. Ky. 1972)(holding that the wording of 40 U.S.C. § 270a(a) indicates strongly that Congress, in using the word "contracts," had in mind only contracts between the United States and prime contractors). Additionally, the Miller Act applies only to bonds furnished to the United States. See Socony-Vacuum Oil Co. v. Continental Casualty Co., 219 F.2d 645, 647 (2d Cir. 1955)(distinguishing the rights of a subcontractor's supplier against the subcontractor's surety on a private bond from its rights against the prime contractor's surety on a bond furnished under the Miller Act). In United States ex rel. DeGeorge Glass Co. v. R.M. Walker Co., Civ. A. No. 91-4039, 1992 WL 178682, at *1 (E.D. La. July 17, 1992), the Court held that a sub-subcontractor had no rights under the Miller Act to recover on a subcontractor's bond in favor of the prime contractor. The Court held, however, that did not necessarily preclude the sub-subcontractor's claims against the Miller Act surety or its claims against the subcontractor's surety on other theories of liability. Id., at *2.

In this case, the bond furnished by Greenwich was clearly a

private payment bond, on an AIA form, listing Incor as the contractor and USA, Inc., as the owner. (Ex. A.) The bond was not furnished pursuant to the Miller Act nor was it given to the United States, as required by 40 U.S.C. § 270a(a)(1). Compare Ex. A with Ex. B (USF&G Payment Bond made pursuant to 40 U.S.C. § 270a-270e, on a Standard Form, listing the obligation of the principal and surety to the United States). Polied has no cause of action under the Miller Act against Greenwich or Incor on this bond, and, therefore, its claims against these defendants set forth in Count One are dismissed.

Likewise, since Polied's CUTPA claims in Count Two against Greenwich and Incor are premised solely on their alleged Miller Act violations, those claims are likewise dismissed.

Therefore, the Motion to Dismiss the Second Amended Complaint as to Defendants Greenwich and Incor is GRANTED.

SO ORDERED.

Date: April 4, 2003.
Waterbury, Connecticut.

_____/s/_____
GERARD L. GOETTEL,
United States District Judge